No. 92-1071

In the Supreme Court of the United States

OCTOBER TERM, 1992

OGNIAN BOZAROV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing the order of the district court dismissing the indictment in this case.

1. Petitioner was indicted by a grand jury sitting in the Central District of California. He was charged with conspiracy to violate the Export Administration Act of 1979 (EAA), 50 U.S.C. App. 2401, for his role in a scheme to transport to Bulgaria computer disc manufacturing equipment, commodities listed on the Commodity Control list as subject to export control. Pet. App. A4-A5.

The Export Administration Act provides for controls on exports of sensitive technology. It requires the Secretary of Commerce to establish and maintain the Commodity Control List and to issue licenses for the export

of listed goods and technologies. The Act delegates substantial authority to the Secretary and contains an elaborate set of criteria and procedures that govern the Secretary's imposition of export controls. Pet. App. A4.

On August 29, 1991, the district court dismissed the indictment on the ground that the Act violated the constitutional separation of powers doctrine by delegating to the Secretary of Commerce legislative authority to control exports and prohibiting judicial review of the Secretary's decisions. Pet. App. A20-A27, A32-A35.

The court of appeals reversed. Pet. App. A1-A17. The court ruled that the Act's preclusion of judicial review does not violate the nondelegation doctrine or petitioner's right to due process. The court said that the legislation was valid because Congress laid down an "intelligible principle" to channel the discretion of the Executive. The court explained that this Court's decisions on preclusion of judicial review, "the language of the Administrative Procedure Act, and the fact that the EAA involves foreign policy issues support our conclusion that the EAA's preclusion of judicial review is constitutional." Pet. App. A14-A15.

2. Petitioner contends (Pet. 3-10) that the Export Administration Act violates the separation of powers doctrine because Congress may not make a broad delegation of authority to the Executive that precludes judicial review of the delegated functions. Whatever the merits of petitioner's contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he

may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.* It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

JANUARY 1993

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.